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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-501

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY,
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT


JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 LaSalle Street South
Chicago, Illinois 60603

JOHN W. PELINO
MORRIS L. CHUCAS
PELINO, WASSERSTROM & CHUCAS
Architects Building
17th and Sansom Streets
Philadelphia, Pennsylvania 19103

BURT A. BRAVERMAN
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

*Attorneys for Petitioners Terminal Freight Cooperative Association and Terminal Freight Handling Company*



WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

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TERMINAL FREIGHT CO-OPERATIVE ASSOCIATION and
TERMINAL FREIGHT HANDLING CO.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

MOTION TO FILE PETITION FOR WRIT OF CERTIORARI

Terminal Freight Co-operative Association and Terminal Freight Handling Co. ("Terminal"), by their attorneys, hereby move this Court for leave to file the attached petition for writ of certiorari. This motion is necessitated by an extraordinary sequence of events in which Terminal, relying on mistaken information that its application for extension of time had been granted, did not file its petition within the time initially allowed when, in fact, the extension had not been granted and Terminal's time for petitioning for certiorari was thereby unknowingly allowed to expire.

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In support of this motion, the following is shown*:

1. On May 9, 1972, the United States Court of Appeals for the Third Circuit entered judgment in Terminal Freight Co-operative Association v. NLRB (Third Circuit No. 18948). Intending to seek review of the Third Circuit's decision, but believing that it would be unable to complete preparation of its petition for writ of certiorari within ninety days of entry of judgment, Terminal filed with this Court, on July 31, 1972, an application for extension of time to and including October 6, 1972, in which to petition for certiorari.

2. On June 7, 1972, the Third Circuit denied Terminal's petition for rehearing. Since the filing, and denial, of the petition for rehearing tolled the running of the ninety day period in which to petition for certiorari**, and because Terminal's petition was now no longer due to be filed until September 5, 1972, Terminal voluntarily withdrew its application for extension of time in which to petition for certiorari.

3. During the ensuing two-months, Mr. Jerry Kronenberg, principal counsel for Terminal, moved forward with preparation of Terminal's petition for certiorari, it being Terminal's intention to timely file the petition on

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* The facts material to this motion are more fully stated in the attached affidavits of Jerry Kronenberg and Burt A. Braverman.

**See, e.g., Department of Banking v. Pink, 317 U.S. 264 (1942).

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or before September 5, 1972. However, in the final week preceding the filing date, Mr. Kronenberg was forced to direct his immediate attention to other cases pending before this Court* as well as to matters pending in the lower federal courts. It became apparent to Mr. Kronenberg by Friday, September 1, 1972, that the textual completion, printing and service by the printer of the petition for writ of certiorari, which in part entailed revision of a previously prepared draft, would be impractical, if not impossible.

4. In light of these circumstances, Mr. Kronenberg, whose offices are located in Chicago, requested Burt Braverman, one of Terminal's Washington attorneys, to immediately prepare and file an application for extension of time in which to petition for certiorari. The application was filed promptly Tuesday morning, September 5, 1972 (Monday being a national holiday), the earliest date on which the application could be presented to one of the Justices, and Mr. Braverman was advised by the Clerk's Office that the application would be taken directly to Justice Brennan.

5. Later that day, Mr. Braverman called the Clerk's Office to inquire whether there had been any action by the Court on Terminal's application for extension of time. An unidentified female employee agreed to check the status of the application and, upon returning to the phone, informed Mr. Braverman that Terminal's application for extension of

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*Mr. Kronenberg is also actively involved in U.S. v. Emmons, NLRB v. Granite State Joint Board, and International Van Lines v. NLRB.

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e to and including October 21, 1972 in which to petition
r certiorari had been granted. Mr. Braverman immediately
lephoned Mr. Kronenberg (who, as noted above, was principally
sponsible for preparation of Terminal's petition), to
form him of the Court's action and to advise him that
rminal's petition need not be filed until October 21, 1972.

6. On the morning of September 7, 1972, Mr.
raverman received a letter from the Office of the Clerk,
gned by Deputy Clerk Julian S. Garza, Jr., stating that
rminal's application for extension of time was being
turned because the time for filing had expired. Because
r. Braverman had previously been advised by the Clerk's
fice that the application for extension of time had been
anted, he immediately called Mr. Garza.

7. Mr. Garza stated that he could offer no
planation of why, or on what basis, an employee of the
erk's Office had informed Mr. Braverman that Terminal's
plication had been granted. Mr. Braverman then explained
Mr. Garza why Terminal's application had in fact been
mely filed, with which explanation Mr. Garza agreed,
d Mr. Garza then suggested that the application, along with
ditional papers clarifying its timeliness, be resubmitted
r processing by the Court. By this time, however, the
e for filing Terminal's petition had expired and
rminal was thus precluded from filing the petition itself
th the Court.

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* The copy of the Third Circuit's order denying the petition for rehearing, which was attached to Terminal's application, had been undated.

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8. On September 7, 1972, Terminal's application was resubmitted to the Court. On September 14, 1972, counsel for Terminal received written notice that Justice Brennan denied Terminal's application for extension of time in which to petition for certiorari.*

9. As the attached affidavits more fully state, Terminal's counsel were prepared to file, and would have filed, a typewritten proof copy of Terminal's petition had they been informed either that the Court denied, or had failed to yet consider, Terminal's application by close of business on September 5, 1972.** However, employing standard procedure of phoning the Clerk's Office to ascertain the status of the application, Mr. Braverman was informed that the application for extension of time had been granted. Relying on that information, Terminal did not file, as it could have, the typewritten proof copy of its petition, believing instead that it had until October 21, 1972 to do so.

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* Terminal submits that the denial of the application, which came after Terminal was mistakenly informed that the application was granted and after the time for filing the petition had expired, is of no moment to the instant motion. For, as explained below, had Terminal's attorneys been informed on the afternoon of September 5, 1972, that the Court had not yet acted on the application for extension, Terminal's attorney would have filed its typewritten proof copy thus rendering the petition timely filed and Justice Brennan's denial of the application for extension unprejudicial to this Court's jurisdiction.

** As the affidavit of Mr. Braverman indicates, such a procedu has been followed in many cases, including, for example, J.L. Simmons Company, Inc. v. Local 742, Carpenters Union, No. 71-357. There, however, on the day the petition was due to be filed, Mr. Braverman was informed by telephone that the application for extension of time in which to petition for certiorari had been denied. Accordingly, a typewritten proof copy of the petition was filed with the Court later that evenin with printed copies of the brief being substituted thereafter.

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10. It has been, and continues to be, Terminal's desire to seek this Court's review of the Third Circuit's decision. Terminal submits that the extraordinary sequence of events which has necessitated this motion -- circumstances for which the parties have no responsibility -- should not be allowed to prejudice this Court's jurisdiction to consider the important questions of procedural fairness which are presented in the attached petition for writ of certiorari and which have been in litigation enroute to this Court for nearly three years. Without denigrating the need to observe orderly and regular processes in the administration of the judicial system, it is urged that, in light of the extraordinary circumstances of this case, the Court can and should accept the attached petition for writ of certiorari for filing and thereby preserve its jurisdiction over the important substantive questions presented.

WHEREFORE, for the foregoing reasons, Terminal Freight Co-operative Association and Terminal Freight Handling Co. move this Court for leave to file their petition for writ of certiorari.

Respectfully submitted,

Jerry Kronenberg
Borovsky, Ehrlich & Kronenberg
120 S. LaSalle Street
Chicago, Illinois 60603

Burt A. Braverman
Cole, Zylstra & Raywid
2011 Eye Street, N.W.
Washington, D.C. 20006

Attorneys for Terminal Freight Cooperative Association and Terminal Freight Handling Co.

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[1] 12 U.S.C. §1651(a).

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AFFIDAVIT

I, BURT A. BRAVERMAN, being first duly sworn, do hereby depose and state as follows:

That I am an attorney practicing in the District of Columbia, with offices at 2011 Eye Street, N.W., Washington, D.C.;

That I have performed legal services for the Terminal Freight Cooperative Association and Terminal Freight Handling Company in connection with the petition for certiorari filed herewith in Terminal Freight Cooperative Association v. NLRB;

That on July 31, 1972, an application for extension of time to and including October 6, 1972, in which to petition for certiorari was timely filed with the Clerk of this Court by an attorney in this office on behalf of Terminal Freight Cooperative Association and Terminal Freight Handling Company, which application was filed more than ten (10) days preceding the date on which the petition was due. Subsequently, the application for extension of time was voluntarily withdrawn in light of the fact that, because of the tolling effect of the Third Circuit's denial of Terminal's pending petition for rehearing, ample time for filing the petition might have remained thereby obviating the need for the requested extension.

That when it subsequently became clear that preparation, printing and service of the petition would not likely be completed within the allowed time period, I filed with the Clerk of this Court an application for extension of time in

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which to petition for certiorari, which application was filed on the morning of September 5, 1972, within the time period allowed for filing the petition;

That on the afternoon of Tuesday, September 5, 1972, at the request of Mr. Jerry Kronenberg, the attorney principally responsible for preparation of Terminal's brief and at whose request the application for extension of time was prepared and filed, I called the Office of the Clerk of this Court to inquire if there had been any action on the application for extension of time. I spoke with an unidentified woman, of whose name I am still unaware, and asked her if there had been any action on the application; she said she would have to check the "card" on the case, and asked me to remain on the line. Upon her return to the phone, she indicated that the application for extension of time had been granted;

That immediately after I was informed that the application for extension of time had been granted, I called Mr. Kronenberg to relate to him the Court's action and to advise him that Terminal's brief would now not be due until October 21, 1972;

That on the morning of September 7, 1972, I received a letter from the Office of the Clerk, signed by Deputy Clerk Julian S. Garza, Jr., stating that our application for extension of time was being returned because the time for filing the application had expired. Because I had previously been informed by the Office of the Clerk that our application for extension of time had been granted, I called Mr. Garza immediately to determine the basis for his letter;

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That in my conversation with Mr. Garza, I noted that I had previously been informed by his office that our application had been granted. He agreed to check the Court's records, but could find no indication that our application for extension of time had been granted, or even considered. After demonstrating to him that our application had been filed within the time allowed for the filing of the petition (the date of the denial of rehearing by the U.S. Court of Appeals for the Third Circuit had been omitted from the application), Mr. Garza then stated that we should resubmit our application for extension of time, together with a dated copy of the Third Circuit's order denying the petition for rehearing, and that the application for extension of time would then be processed.

That the procedure which I followed in checking on the status of our application for extension of time -- i.e., calling the Office of the Clerk to ascertain whether the Court had acted upon our request, and relying upon the oral information received over the telephone -- has been employed by me, and by other members of my firm, in numerous cases in which we have represented Terminal Freight Cooperative Association and other clients of this firm before this Court.* Particular emphasis has been placed on this procedure with respect to applications for extension of time, since awaiting written notice will often permit the relevant time

*E.g., Terminal Freight Handling Co. v. Solien, No. 71-609; Sears, Roebuck and Co. et al. v. Solien, No. 71-924; Sears, Roebuck and Co. v. Solien, No. 1508-70; Tocquet v. Weinberger Inc., No. 74-69; ITT v. Minter, No. 1467-70; Sears, Roebuck and Co. v. Carpet Layers Union, et al., No. 476-69.

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ied to expire when, in contrast, oral notice of adverse
rt action may still allow enough time for the filing of
relevant document. For example, in J. L. Simmons Company,
v. Local 742, Carpenters Union, No. 71-357, an application
extension of time was filed on September 2, 1971, one
before the petition for certiorari itself was due to be
ed. On September 3, 1971, I was advised by telephone
versation with the Clerk's office that the application for
nsion of time was denied. While it was no longer possible
make the necessary revisions and additions to the brief which
ated the application for extension of time, principal
sel for petitioner J. L. Simmons, with the assistance of
office, was able to, and did, timely file the petition for
t of certiorari on September 3, 1971, in a typewritten proof
y. The proof copy was subsequently replaced by the required
ber of printed petitions;

That following this same procedure in the instant
e, and having been told, apparently mistakenly, that our
lication for extension of time to petition for certiorari
d been granted, I relied upon such information and advised
. Kronenberg that he need no longer attempt to file the
f within the time period originally permitted under the
rt's rules but that, instead, the petition need only be
ed on or before October 21, 1972. Had I been told by the
k's office that our application for extension of time had
n denied or that no action had been taken, I would have
ised Mr. Kronenberg to file a typewritten copy of the

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petition for certiorari with the Court on September 5, 1972 and to later substitute the requisite number of printed copies (substance unchanged), as was done in the J. L. Simmons case.

Bert A. Braverman

Subscribed and sworn to before me this 7th day of September, 1972.

Constance B Fath
Notary Public

My commission expires: 12/1/76

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AFFIDAVIT

I, Jerry Kronenberg, being duly sworn, depose and ... as follows:

That I am an attorney with offices at 120 South ...lle Street, Chicago, Illinois; I am also a member of the ... of this Court and represent Terminal Freight Cooperative ...ciation and Terminal Freight Handling Company in connection ... a petition for writ of certiorari which is being filed ...currently herewith;

That during the week prior to the date on which said ...tion was due to be filed, numerous other matters arose ... remained pending, including matters before this Court ...ch required immediate and concurrent attention, leading ...y conclusion that the completion of Terminal's petition, ...luding printing and service by the printer, might not be ...ved prior to the date for filing the document;

That on Friday, September 1, 1972, when it appeared ... the foregoing conclusion was warranted, I contacted ...inal's Washington counsel for the purpose of authorizing ... to prepare and file an application for extension of time ... which to file the petition. In the interim, efforts at ...pletion of a draft of the petition continued in anticipation ... possible unfavorable action by the Court on the application ... extension of time;

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That is was my intention, in the event of an adverse ruling by the Court, to forward typewritten copies of Terminal's petition to the Court for filing on its due date, substitution of printed copies to be made subsequently;

That in accordance with this intention, I telephoned Burt A. Braverman, Washington counsel, on Tuesday, September 5, 1972, in order to determine the status of the pending application for extension of time; in the event either that the application should be denied or should not have been acted upon, copies of a draft of Terminal's petition were readied for transmittal by plane to Washington counsel who would meet the plane at the airport and transport the document directly to this Court for filing;

That on Tuesday, September 5, I was informed by Mr. Braverman that the application for extension of time had been granted to October 21, 1972;

That as a consequence of this information, the described plans to file typewritten copies of the petition were not followed. But for the receipt of that information, typewritten copies of the petition would have been filed in the manner indicated; and

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That word of the Court's denial of the requested extension did not reach me until September 15, 1972.

Jerry Kronenberg

Subscribed and sworn to before me this 25th day of September, 1972.

Constance C. Fait
Notary Public

My commission expires: 03/14/76

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## INDEX


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statute Involved | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 7 |
| A. The Statute Does Not Confer Upon the Board's General Counsel an Unreviewable Discretion to Adjudicate Meritorious Unfair Labor Practice Charges | 8 |
| B. A Disposition by the General Counsel of Charges Which He Had Determined To Be Meritorious Is A Final Order of An Agency Which Is Subject to Review | 13 |
| Conclusion | 17 |
| Appendix | 19 |


## CITATIONS

Cases:


| | |
|---|---|
| *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967) | 13 |
| *Association of Data Processing Services Organizations* v. *Camp*, 397 U.S. 150 (1970) | 13, 15 |
| *Barlow* v. *Collins*, 397 U.S. 159 (1970) | 13, 15 |
| *Columbia Broadcasting System, Inc.* v. *U.S.*, 316 U.S. 407 (1942) | 13 |
| *Frito Company, Western Division* v. *NLRB*, 330 F.2d 485, 55 LRRM 2933 (CA 9, 1964) | 9, 10, 11, 15 |
| *Hourihan* v. *NLRB*, 201 F.2d 187 (CA DC, 1953), cert. den. 345 U.S. 930 (1953) | 11 |
| *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527 (CA 3, 1966) | 14, 16 |

CITATIONS—Continued


| | Page |
|---|---|
| *Local 112, International Union Allied Industrial Workers* v. *Rothman*, 209 F.Supp. 295 (D DC, 1962) | 11, 15 |
| *Sears, Roebuck and Co.* v. *NLRB*, —— F.Supp. ——, 80 LRRM 3428 (D DC, 1972) | 11, 14 |
| *Sears, Roebuck and Co. et al.* v. *Solien*, 450 F.2d 353 (CA 8, 1971) | 15, 16 |
| *Solien* v. *Miscellaneous Helpers and Drivers Union, Local 610*, 440 F.2d 124 (CA 8, 1971), cert. den. 403 U.S. 905 (1971) | 5 |
| *Terminal Freight Cooperative Association* v. *Samoff*, 420 F.2d 952 (CA 3, 1965), cert. den. 398 U.S. 965 (1970) | 5 |
| *Terminal Freight Handling Company* v. *Solien*, 444 F.2d 699 (CA 8, 1971) | 6 |
| *United Auto Workers* v. *Scofield*, 382 U.S. 205 (1965) | 13, 15 |
| *Vaca* v. *Sipes*, 386 U.S. 171 (1967) | 11 |

Statutes:

| | |
|---|---|
| 28 U.S.C. § 1254(1) | 2 |
| National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*): | |
| Sec. 3(d) | 2, 3, 6, 7, 8, 9, 10 |
| Sec. 8(b)(4)(i)(ii)(B) | 4 |
| Sec. 10(b) | 4 |
| Sec. 10(c) | 4 |
| Sec. 10(l) | 5 |

Miscellaneous:

| | |
|---|---|
| 34th Annual Report of the NLRB: Fiscal Year 1969, 1970 BNA Labor Relations Yearbook, 289 | 14 |

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TERMINAL FREIGHT COOPERATIVE ASSOCIATION and
TERMINAL FREIGHT HANDLING COMPANY,
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners Terminal Freight Cooperative Association and Terminal Freight Handling Company, charging parties before the National Labor Relations Board, seek a writ of certiorari to review a decision of the United States Court of Appeals for the Third Circuit which held that petitioners were foreclosed from seeking administrative or judicial review of the unilateral approval by the Board's General Counsel, over petitioners' objections, of a settlement of petitioners' pending and meritorious unfair labor practice charges; the decision below was premised upon the view that the General Counsel had acted within the ambit of an "unreviewable discretion"

allegedly conferred upon him by Section 3(d) of the National Labor Relations Act (29 U.S.C. § 153(d)).

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 447 F.2d at 1099. (App. A).

The denial by that court of a petition for rehearing en banc, with dissenting opinion, is reported at —— F.2d ——, 80 LRRM 2734. (App. B).

The refusal by the Board to review the approval of a settlement agreement by its General Counsel which resolved the merits of these petitioners' charges and fixed the nature of the remedy to be afforded, from which decision review was sought in the Third Circuit, is reproduced at App. D.

## JURISDICTION

The opinion of the court below was issued on August 30, 1971. Judgment was entered by the court on May 9, 1972. The petition for rehearing en banc was denied, one judge dissenting, on June 7, 1972.

The timeliness of the instant petition is addressed in an accompanying motion and supporting affidavits.

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

## QUESTIONS PRESENTED

1. Whether charging parties before the National Labor Relations Board possess the right of administrative or judicial review of a decision of the Board's General Counsel to accept, prior to his issuance of a formal complaint, a settlement of their meritorious unfair labor practice charges on terms which they believe to be inadequate.

2. Whether the General Counsel's adjudication of pending unfair labor practice charges, which his investigation has shown to be meritorious, is entrusted to his "unreviewable discretion" under Section 3(d) of the Act if such an adjudication precedes his issuance of an administrative complaint.

3. Whether a final disposition of substantive statutory rights by the administrative agency may be exempt from any review in the absence of express statutory warrant.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. *et seq*), are as follows:

> Section 3(d): The General Counsel for the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

## STATEMENT OF THE CASE

### A. The Relevant Facts

On about April 16, 1969, the International Association of Machinists, District Lodge No. 1, commenced picketing the premises of Terminal Freight Cooperative Association and Terminal Freight Handling Company [1] pursuant

[1] Terminal Freight Cooperative Association is a non-profit shippers association composed of over forty multi-state companies including Boeing Company, Broadway-Hale Stores, North American

to the Union's dispute with Sears, Roebuck and Co. Terminal was not a party to the dispute and the picketing constituted an unlawful secondary boycott.

On April 18, 1969 Terminal filed charges with the National Labor Relations Board alleging that the Union had engaged in proscribed picketing and boycott activity in violation of Section 8 (b) (4) (i) (ii) (B) of the Act.

The Regional office of the Board in which these charges had been filed concluded, following an investigation of the parties' assertions and defenses, that there was reasonable cause to believe the charges were true and that the Act had been violated. The Regional office then petitioned for injunctive relief under Section 10(c) of the Act on April 24, 1969; in its petition the Regional Director stated that:

> "Petitioner has reasonable cause to believe that said charge is true insofar as it alleges that respondent has violated Section 8(b) (4) (i) and (ii), subparagraph (B) of the Act, *and that a complaint of the Board based on such charge should issue* against respondent pursuant to Section 10(b) of the Act." (Emphasis added)

On the same day the Regional Director also sought and obtained a temporary restraining order enjoining the Union from a continuation of its secondary activity which was causing irreparable harm not only to Terminal but "to the national defense and to the public interest."[2]

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Rockwell Corporation, Whirlpool Company, General Dynamics Corporation and Sears, Roebuck and Co., which receives less than carload and truckload shipments, consolidates such shipments into carload lots and reships such goods to members' plants at various locations throughout the country. The Handling Company is a non-profit Delaware corporation engaged in the handling, consolidation and transhipment of freight as manager of the Association, operating at more than forty terminals throughout the United States. For ease of reference these petitioners will hereafter be referred to as "Terminal".

[2] The jeopardy to the parties' rights, as to other charging parties, is continuing, subject to reoccurrence and therefore deserving of this Court's attention.

A hearing on the Director's petition for further injunctive relief, though scheduled, was never held; the Director executed a form of settlement stipulation with the offending Union which the Director urged the court to approve over Terminal's objections and in lieu of other relief sought by Terminal. The District Court approved the stipulation over Terminal's objections on the stated grounds that Terminal did not constitute a "party" in the court and therefore lacked standing to lodge such objections to the adequacy of the relief afforded by the stipulation.[3]

On May 13, 1969 the Respondent Union and the Director agreed to the terms of an entire settlement of the underlying unfair labor practice charges which Terminal had filed. The agreement contained the Union's promise to cease and desist from certain conduct which the Director had previously determined to be unlawful.

On May 23, 1969 Terminal, constituting a full party in the administrative proceeding, filed detailed objections with the Director as to the remedial adequacy of the settlement agreement.[4]

Although the Director had as early as April 24, 1969 determined "that a complaint . . . should issue" in the case, when he dismissed Terminal's objections to the

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[3] Whether charging parties before the Board possess the status of "parties" in District Court proceedings under Section 10(l) is an issue which Terminal pursued in the Third Circuit in appealing the District Court's decision (*Terminal Freight Cooperative Association* v. *Samoff*, 420 F.2d 952 (CA 3, 1969)) and in the Eighth Circuit (*Solien* v. *Miscellaneous Helpers and Drivers Union, Local 610*, 440 F.2d 124 (CA 8, 1971)). Petitions for writs of certiorari were sought by Terminal and were denied by this Court in both of these cases. 398 U.S. 965 (1970); 403 U.S. 905 (1971).

[4] These objections involved the scope of the remedy (failure of the agreement to cover unions other than the respondent which assisted the respondent to function as its agents); failure to distribute formal notices to all who participated in the unlawful conduct; the language of the notice itself and the presence of a clause disclaiming the respondents' violation of the Act.

settlement agreement on December 12, 1969—seven months after they were lodged—there was still no complaint on file.[5]

On January 22, 1970 Terminal sought reversal of the Director's action from his superior, the General Counsel, who, on March 25, 1970, sustained the decision of his agent.

On April 16, 1970 Terminal sought review by the Board of the General Counsel's approval of the challenged and allegedly inadequate settlement (App. C).

### B. The Decision of the Board

The Board, on April 28, 1970 refused to entertain the appeal on the ground that until the General Counsel issues a complaint in a case, the matter is not transferred to the Board's jurisdiction; that is, any act committed by the General Counsel prior to his issuance of a complaint is within his absolute discretion and is not reviewable, assertedly pursuant to Section 3(d) of the Act. (App. D)

### C. The Decision of the Court of Appeals

Application was made by Terminal for review of the Board's refusal to accept appellate jurisdiction. The Court of Appeals affirmed the Board's decision, holding that the issuance of the formal document entitled "complaint" by the General Counsel must occur before the Board or the courts may review the General Counsel's conduct. The Court of Appeals did not, however, address itself to either of the two basic legal contentions urged by Terminal:

1) That the General Counsel's unreviewable discretion extends only to prosecutorial acts; Section 3(d) conferred

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[5] The problem of undue delay by the General Counsel in protecting the statutory rights of charging parties was successfully raised by Terminal in *Terminal Freight Handling Company* v. *Solien*, 444 F.2d 699 (CA 8, 1971).

no unreviewable adjudicatory role upon the General Counsel, Congress having entrusted that role to the Board. The disposition of substantive rights, as effected by settlement agreement here, is not a prosecutorial function and is not therefore within the ambit of the General Counsel's "unreviewable discretion."

2) A substantive adjustment of the entire merits of a case by the General Counsel, if a final disposition by an administrative agency, is judicially reviewable by those who were aggrieved by the agency's action.

A petition for rehearing en banc was denied by the court with a dissent by Judge Rosenn who concurred in Terminal's view of the purpose and limits of Section 3(d) of the Act.

## REASONS FOR GRANTING THE WRIT

This case presents for consideration a matter of fundamental importance to those whose statutory rights and interests have been entrusted by Congress to the regulation and protection of federal administrative agencies, i.e., the right of aggrieved parties to obtain review of adverse agency decisions which deprive them of those statutory rights.

The court below concluded that no such right of review existed in this case in the belief that all acts committed by the General Counsel prior to his issuance of an administrative complaint fall within the ambit of his unreviewable discretion even where such acts constitute the final disposition of the merits of pending meritorious unfair labor practice charges.

The possession by any agency of "unreviewable discretion" constitutes an inherent danger to those whose rights are administered by the agency. When such an asserted unreviewable discretion is invoked in order to preclude either further administrative or judicial scrutiny of the

nature of the agency's disposition of meritorious claims of violation of statutory rights, then the question of the existence either of the claimed discretion or aggrieved parties' right of review rises to the status of a matter warranting this Court's attention.

Certiorari is thus sought to secure, for the first time, clarification of this important question in the administration of the Act.

**A. The Statute Does Not Confer Upon the Board's General Counsel an Unreviewable Discretion to Adjudicate Meritorious Unfair Labor Practice Charges.**

**1) *The Purpose and Extent of the Delegation of Discretion Under Section 3(d)***

Section 3(d) of the Act confers upon the General Counsel an unreviewable discretion in three respects only: (i) to investigate charges; (ii) to issue or decline to issue complaints; and (iii) to prosecute such complaints before the Board. These are all acts which fall within the description of investigatory or prosecutorial functions only. The delegation of these functions to the General Counsel empowers him, as an extention of the duties enumerated above, to make a determination as to whether there exists reasonable cause to believe that the Act was violated, to decide whether the nature of the violations found are sufficiently serious to warrant the agency's effort to obtain relief, and to function as a prosecutor in any proceedings which might ensue.

None of these functions or duties involve an *adjudicatory* role. That role has remained the responsibility of the Board and has never been delegated by the Board or by Congress. The purpose for the delegation of certain unreviewable authority to the General Counsel in Section 3(d) was to remove from the Board the exercise of *prosecutorial* functions so that the same administrative body

would not serve as both prosecutor and judge in the same proceeding.

> "By enacting Section 3(d) Congress intended to effect a separation of the prosecuting and adjudicating functions within the Board (citations omitted) . . . . It is apparent that Congress intended that the Board should retain its judicial and policy making functions . . . the judicial process . . . is reserved to the Board." [6]

The determination as to whether a complaint should issue, which Section 3(d) entrusts to the General Counsel, is a prosecutorial judgment predicated upon the General Counsel's investigation of the facts, his application of the facts to the law and his judgment as to whether any resulting violations of law are of more than *de minimis* consequence and are hence worthy of adjudication. The authority to determine whether a complaint should issue does not encompass the power to render a final judgment on the merits of a dispute and an unreviewable assessment of the form and extent of relief which is appropriate to cure the violations found.[7] Rather, the prosecutorial discretion conferred in Section 3(d) to issue complaints means only that the General Counsel, and not the Board, shall make the threshhold judgment that probable cause exists to believe the law was violated.[8]

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[6] *Frito Company, Western Division* v. *NLRB*, 330 F.2d 485, 55 LRRM 2933, 36, 37 (CA 9, 1964).

[7] The court below interpreted this clearly adjudicatory function to belong to the General Counsel as a consequence of Section 3(d), notwithstanding Congress' intent therein to divest the Board of its prosecutorial role only.

[8] Were the Board empowered to make that initial judgment, then it could compel the issuance of a complaint which it would thereafter adjudicate, thus merging the prosecutorial and adjudicatory functions which Congress sought to separate. Similarly, were the General Counsel empowered under Section 3(d) to compel a final disposition of the merits and relief of cases, by settlement or otherwise, in which he performed a prior investigatory and prosecutorial

### 2) *Exhaustion of the Discretion*

Since the essential purpose of Section 3(d) is to confer an exclusive discretion on the General Counsel to determine whether reasonable cause exists to believe a violation of law has occurred warranting an administrative remedy, then once the General Counsel makes this judgment the unreviewable discretion conferred in Section 3 (d) has been exhausted. Similarly, once the General Counsel has made such a determination, then any subsequent acts he performs to affect the nature of the remedy to be imposed for the violation of law he believes to have occurred (as in this case, for example, by his negotiating and approving the terms of a settlement agreement purportedly remedying a meritorious unfair labor practice case) constitutes an exercise of a reviewable adjudicatory function and not an unreviewable prosecutorial function. Thus, since the unreviewable prosecutorial discretion conferred on the General Counsel is limited to the authority to *decide* whether the law was violated and should be prosecuted, his *decision* that the law was violated commences the adjudicatory stage of proceedings and effects a transfer of the case to the Board. Whatever action the General Counsel thereafter takes to effect the ultimate disposition of the merits of the case is taken by him as an agent of the Board and is reviewable by the Board and the courts.

The idea that it is the *decision* of the General Counsel to proceed to a prosecution of the case—the prosecution may be by complaint or by settlement—which transfers the case to the adjudicatory stage has been adopted by the only circuit court which has specifically addressed that issue. In *Frito, supra*, the Ninth Circuit held:

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role, then Congress would have created for the General Counsel the same merger of functions which it sought in 3(d) to remove from the Board.

"It is now well settled that the General Counsel's decision to investigate a charge or issue a complaint is unreviewable by the Board. However, *once the decision has been made to issue a complaint* and to prosecute it, the General Counsel has embarked upon the judicial process which is reserved to the Board. If the General Counsel can control this process, then the General Counsel can indeed usurp the Board's responsibility for establishing policy under the Act by simply withholding from the Board any issue which might precipitate a meaningful policy decision not in accord with the views of the General Counsel." (Emphasis added) [9]

~~In *Frito, supra*, the Ninth Circuit held:~~

The conclusions reached above are not inconsistent with those cases which have held that the General Counsel may not be compelled to issue a complaint and his refusal to do so is unreviewable.[10] Such cases have all involved situations where the General Counsel had determined that *no* violation of law had been committed and review was sought of that judgment. In those cases, therefore, the review sought to question what is in fact most basic to the exercise of the prosecutorial function, i.e., the initial decision of probable illegality or legality of questioned conduct. Since that function is concededly conferred exclusively on the General Counsel under 3(d), the appeals of his judgment failed as constituting efforts to review an unreviewable decision. Those cases are entirely different from situations where the General Counsel *has* determined that violations of law were committed warranting

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[9] A recent district court decision has reached the same result. *Sears Roebuck and Co.* v. *NLRB*, ——F.Supp. ——, 80 LRRM 3428 (D.D.C., August 10, 1972). See also *Local 112, International Union of Allied Industrial Workers* v. *Rothman*, 209 F.Supp. 295 (D.D.C. 1962).

[10] *Hourihan* v. *NLRB*, 201 F.2d 187 (CA DC, 1953), cert. den. 345 U.S. 930 (1953); *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

relief but declines to issue a complaint because he elects a different means than a complaint proceeding in which the rights and remedies of the aggrieved parties are to be adjudicated. In the instant proceeding, for example, the General Counsel had completed his delegated prosecutorial function when he determined that the Union's conduct was unlawful and should be remedied. He had, therefore, exhausted the unreviewable discretion conferred by Section 3(d). His subsequent refusal to issue a Complaint did not trace to any question as to whether the law had been violated, but rather to his view as to the form of remedy which was appropriate to cure the wrongs committed and to protect the injured parties in the future. Yet that is precisely the exercise of an adjudicatory function reserved to the Board and reviewable by the Board.

The emphasis and reliance by the court below on the inability to compel the General Counsel to issue a Complaint merges the quite different situations in which (1) a complaint is not issued because no violation of law was found, and (2) a complaint is not issued because "appropriate" relief for violative conduct is thought to exist in an alternative form. In the first situation the conduct of the General Counsel is unreviewable. In the second, although the General Counsel cannot be compelled to prosecute the case by formal complaint rather than by informal means, his subsequent adjudicatory acts—whatever the forum—are reviewable. That is, having found the requisite reasonable cause, in any subsequent disposition of the case, by settlement or otherwise, the General Counsel functions as an agent of the Board; his decisions are reviewable by the Board; and the Board's refusal to examine the merits of the General Counsel's substantive disposition of the entire case (as is involved here) is erroneous and is reviewable in the courts.

**B. A Disposition By the General Counsel of Charges Which He Has Determined To Be Meritorious Is A Final Order of An Agency Which Is Subject to Review**

This Court has demonstrated a continuing concern that those whose interests are sought to be protected by statute should be able to seek judicial review of administrative actions adversely affecting their statutory rights. *Columbia Broadcasting System, Inc.* v. *U.S.*, 316 U.S. 407, 424 (1942):

> "The ultimate test of reviewability is not to be found in an overrefined technique, but in a need of the review to protect from irreparable injury threatened in the exceptional case by administrative rulings."

*Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967):

> ". . . only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."

The Court's appreciation for the needs of charging parties before administrative agencies to the protections afforded by the right of review has resulted in a series of recent holdings recognizing the standing of aggrieved charging parties to review adverse agency action. *United Auto Workers* v. *Scofield*, 382 U.S. 205 (1965); *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970).

The effect of the opinion of the court below was to declare all conduct of the General Counsel which disposes of parties' statutory rights prior to his issuance of a complaint to be exempt from the coverage of the foregoing authorities of this Court.

The propriety of the exemption created below and the conflict between the circuit courts which results warrant this Court's attention.

1) Statistics released by the Board reveal that over 90% of all unfair labor practice charges are disposed of prior to hearing.[11] To limit the right of review of administrative dispositions of parties' rights to those cases in which the General Counsel has chosen to issue a Complaint and proceed to hearing would constitute a denial of the protection which this Court has sought to afford to persons aggrieved by agency action. The consequences of an adverse disposition of statutory rights through an imposed settlement by the General Counsel is no less harmful to the interests of affected parties than an adjudication of those rights by any other means. *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527 (CA 3, 1966).

2) A final disposition of meritorious charges by the General Counsel constitutes a final order of an administrative agency and is thus subject to review pursuant to this Court's determination [12] that aggrieved parties are entitled to seek review of adverse agency action. In *Sears, Roebuck and Co.* v. *NLRB*, —— F. Supp. ——, 80 LRRM 3428, 30 (D DC, 1972), the General Counsel conceded that his office constituted an "agency" subject to laws which apply to administrative agencies, and the court so held:

> "The action of the General Counesl's office is clearly final. This is not a preliminary view or a record of advocacy and debate, it is a final determination of the General Counsel's staff of the disposition of a charge. It is not an expression of a point of view, it is a disposition of a charge."

A final determination of the General Counsel which triggered the right of review in the *Sears* case was his making the *decision* as to whether the charged conduct violated the law. This decision, contained in a memorandum of the General Counsel's office, preceded the is-

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[11] 34th Annual Report of the NLRB: Fiscal Year 1969, 1970 BNA Labor Relations Yearbook, 289, 291-3.

suance of any complaint. As in *Frito, supra*, the vesting of the right of review occurred when the General Counsel made his decision of probable cause, a reviewable final order of an administrative agency. The reviewability of a final administrative action of the General Counsel has also been held and approved in *Local 112, International Union Allied Industrial Workers* v. *Rothman*, 209 F. Supp. 295, 297 (D DC, 1962):

> ". . . if Congress in its wisdom could see the need for a right of review from a decision entered by the National Labor Relations Board, as provided in Section 10(f) of the Act, it is difficult to understand how the defendants can argue that a decision of the General Counsel, as in the instant case, is not reviewable. This Court finds jurisdiction conferred by 28 U.S.C. 1337."

3) Final action of the General Counsel, such as is involved in the instant case, has been held to be subject to review in *Sears, Roebuck and Co. et al.* v. *Solien*, 450 F. 2d 353 (CA 8, 1971), thus creating a conflict with the decision below which holds such conduct to be unreviewable In *Solien*, a suit which was instituted by Sears and the present Petitioners, the court held that the propriety of the manner in which the General Counsel disposed of the meritorious charges before him was reviewable by the Board and the courts. Although a Complaint had been filed in that case, the conduct which was there challenged related to the propriety of the General Counsel's *conduct* of settlement negotiations, not the *merit* of the settlement itself, and hence involved a prosecutorial function rather than an adjudicatory one. The *Solien* court declared that reviewing courts had jurisdiction over "all questions of the regularity of Board proceedings, constitutional rights or statutory authority."

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[12] *UAW* v. *Scofield, supra; Association of Data Processing Service Organizations* v. *Camp, supra; Barlow* v. *Collins, supra.*

The *Solien* case and the instant case were brought to resolve the matter of the reviewability of final acts of the General Counsel. The former held to be reviewable all acts of the General Counsel which relate to his disposition of meritorious charges, including those which involve his prosecutorial functions, while the court below held to be unreviewable, in the absence of the issuance of a complaint,[13] even those functions which are clearly adjudicatory. As a result of this extensive litigation, the reviewability of the General Counsel's conduct and the proper interpretation to be accorded to Section 3(d) of the Act are no more settled than before the litigation was undertaken.[14]

Clarification of these important questions in the administration and enforcement of the Act is needed.

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[13] Whether a complaint is issued by the General Counsel where the has found reasonable cause to believe the Act was violated is a matter over which the charging parties have no control, and that decision is not necessarily related to the merits of the pending charges. Yet the court below would condition the charging parties' right of review on a fortuitous circumstance they cannot control.

[14] These matters are of great practical importance to charging parties in affecting, for example, their right to a hearing on their objections to settlements imposed upon them by the General Counsel. See *Leeds & Northrup* v. *NLRB, supra.*

## CONCLUSION

For the reasons heretofore expressed and supported, the Court is urged to grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 LaSalle Street South
Chicago, Illinois 60603

JOHN W. PELINO
MORRIS L. CHUCAS
PELINO, WASSERSTROM & CHUCAS
Architects Building
17th and Sansom Streets
Philadelphia, Pennsylvania 19103

BURT A. BRAVERMAN
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

*Attorneys for Petitioners*
*Terminal Freight Cooperative*
*Association and Terminal*
*Freight Handling Company*

## APPENDIX

### TERMINAL FREIGHT CO-OP. ASSN. v. NLRB

U. S. Court of Appeals,
Third Circuit (Philadelphia)

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY v. NATIONAL LABOR RELATIONS BOARD, No. 18948, August 30, 1971

McLAUGHLIN, Circuit Judge:—The Terminal Freight Cooperative Association (hereinafter referred to as Association) and Terminal Freight Handling Company (hereinafter referred to as Company) seek review of the refusal of the National Labor Relations Board to grant them, as the charging parties, an evidentiary hearing on their objections to an informal agreement between the Regional Director and the International Association of Machinists District Lodge No. 1 (hereinafter called the Union). The facts of the case are not complicated, the only question is one of law.

The Association is composed of more than forty multistate companies engaged in major defense contracting, retailing, etc. Petitioner Company is an operating company which conducts operations for the Association at more than forty terminals throughout the United States. The Union does not represent any of petitioners' employees. It does represent some of the employees of Sears, Roebuck and Company, one of the Association's members in the Philadelphia area. During a strike against Sears, Roebuck and Company, the Union began picketing petitioners' premises in the Philadelphia area.

Two days later, on April 18, 1969, petitioners filed an unfair labor practice charge against the Union with the Regional Director of the Fourth Region of the National

Labor Relations Board. After investigating the charge and upon determination that there was reasonable cause to believe it true, the Regional Director, on April 24, 1969, filed a petition pursuant to Section 10(l) of the National Labor Relations Act, as amended (29 U.S.C.A. Sec. 160(l), hereinafter called the Act) for the appropriate injunctive relief. On the same day a temporary restraining order enjoining the Union's alleged secondary activity was obtained.

A hearing was set for April 29, 1969. The hearing was never held; prior to the time scheduled for it, the Union and the Regional Director, over the objections of the petitioners, entered into a stipulation providing for the cessation of the Union's alleged violation of the Act. The stipulation, however, was not to be construed as an admission of guilt. The stipulation provided a method of reinstating the temporary restraining order if said stipulation was violated by the Union. The stipulation was approved by the district court judge, over the objections of the appellants. That decision was appealed. While the appeal was pending, the underlying labor dispute was settled and the appeal was dismissed as being moot. See Samoff v. International Association of Machinists District Lodge No. 1, 420 F.2d 952, 72 LRRM 2989 (3 Cir. 1969), cert. denied, 398 U.S. 965, 74 LRRM 2420.

Shortly after the district court's ruling and while the appeal was still pending, the Union executed an informal settlement agreement concerning the unfair labor charge. By this proposed settlement the Union agreed to post notices for sixty days stating that it would cease its alleged secondary activity. The settlement also provided for the submission of the notices to the employers whose employees were involved in the secondary activity regarding the posting at their places of business. Finally, a disclaimer clause, i.e., a statement that the Union did

not admit violation of the Act, was contained in the agreement.

On May 23, 1969, appellants filed detailed objections to the proposed agreement and requested a hearing on these objections. Some of the objections were the inclusion of the disclaimer clause; that the notice was improperly and ineffectively worded, and that the posting of said notices should be supplemented by mailing a copy of same to all members of the Union and to Teamsters Local No. 107, which union appellants alleged also participated in the secondary activity. Approximately seven months thereafter on December 12, 1969, the Regional Director dismissed the objections and advised petitioners that he was not issuing a complaint and therefore their request for a formal hearing was denied and the settlement agreement which he had previously accepted would stand.

The decision of the Regional Director was appealed to the General Counsel of the National Labor Relations Board in Washington, D.C. It was denied. A subsequent appeal was taken to the National Labor Relations Board which denied the appeal on the grounds that the General Counsel had acted within the ambit of his unreviewable discretion in not issuing a complaint, therefore, the case had not been transferred to the Board for further action or review. A subsequent motion for reconsideration was denied. Petitioners then appealed to this court.

We are called upon to determine whether petitioners as the charging parties are entitled to an evidentiary hearing based on their objections to the informal settlement between the Regional Director and the Union. We have previously held that a charging party is entitled to an evidentiary hearing upon its objections to a proposed settlement agreement, be it formal or informal, once a complaint has been issued. See Marine Engineers' Beneficial Ass'n v. N.L.R.B., 202 F.2d 546 (3 Cir. 1953),

cert. denied, 346 U.S. 819; Leeds & Northrup v. N.L.R.B., 357 F.2d 527 (3 Cir. 1966). The court in both these cases was careful to include in its decision that the charging party had standing for this hearing *after* the complaint was issued. In the present claim no complaint was issued.

Section 3(d) of the Act provides that "The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board, . . . ." 29 U.S.C.A. § 153(d). The courts have held that they have no power over the General Counsel to compel him to issue a complaint. See Hourihan v. N.L.R.B., 201 F.2d 187 (D.C. Cir. 1953), cert. denied, 345 U.S. 930. Also, the Supreme Court has stated that ". . . the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." See Vaca v. Sipes, 386 U.S. 171, 182 (1967). In the instance before us the General Counsel did not issue a complaint, nor can we compel him to do so. Since a complaint is necessary before we can have an evidentiary hearing, it follows that we cannot order one at this time.

Appellants urge that the decision of the Regional Director, as agent of the General Counsel, is reviewable since pursuant to Section 10(l) of the Act he sought injunctive relief. That provision states, "If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court . . . for appropriate injunctive relief pending final adjudi-

cation of the Board with respect to such matter. . . ." The Regional Director in the course of the petition for injunction did state that ". . . a complaint of the Board based on said charge should issue against respondent pursuant to Section 10(b) of the Act." Appellants contend that the filing of the complaint is a mere ministerial act and that the petition for an interim injunction places the proceedings before the Board and is the equivalent of the complaint. We must disagree with this conclusion.

The injunctive proceedings allowed by Section 10(l) are an attempt by the National Labor Relations Act to provide an expeditious remedy to prevent a party from obtaining an unlawful result before the Board can consider the legality of the action in its ordinary course of business. To further this end Section 10(l) provides "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of Section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character. . . ." U.S.C.A. 29 § 160(l). This section then goes on to state that if after the investigation, the regional attorney has reasonable cause to believe the charge is true, he should seek the appropriate injunctive relief. The purpose of this relief is to maintain the status quo pending final adjudication by the Board with respect to the unfair labor charge. See Local Joint Board, Hotel and Restaurant Emp., etc. v. Sperry, 323 F.2d 75 (8th Cir. 1963); Schauffler v. Local 1291, International Longshoremen's Association, 292 F.2d 182 (3rd Cir. 1961; Schauffler v. United Association of Journeymen, etc., 218 F.2d 476 (3rd Cir. 1955). The court in determining if it should grant injunctive relief is not called upon to decide whether a violation of the Act has been committed. The ultimate determination of this question is reserved exclusively for the National Labor Relations Board. The

district court in passing upon the relief requested, decides merely whether there was reasonable cause to believe that a violation of the Act had been committed and whether the sought for equitable relief is the proper remedy. See Kennedy v. Sheet Metal Workers Int. Ass'n Local 103, 289 F.Supp. 65 (C.D. Cal. 1968); Schauffler v. Highway Truck Drivers & Helpers, 230 F.2d 7 (3rd Cir. 1956).

The Supreme Court in deciding a Section 10(l) proceeding was complete in itself stated ". . . Section 10(l) which is designed to assist a preliminary investigation of the charges before filing the complaint. . . . Such proceeding is independent of that on the merits under Section 10(a)-(d). There is a separate provision for securing injunctive relief after the filing of the complaint. § 10(j) . . . ." N.L.R.B. v. Denver Building & Construction Trades Council, et al., 341 U.S. 675, 682 (1951). "The legislative history makes clear that the purpose of enacting Section 10(l) in 1947 was simply to supplement the preexisting 10(e) power of the Board by authorizing injunctive relief prior to Board action." Sears, Roebuck and Company v. Carpet Layers, Local 419, 397 U.S. 655, 658 (1970). Certainly the language of these opinions makes it very clear that a Section 10(l) proceeding is an independent action brought only to maintain the status quo and that the decision of the district court is not binding upon the Board in resolving the ultimate outcome of the unfair labor charge. Obviously further action must be initiated by the General Counsel or his representative, since the Section 10(l) proceeding is only an interlocutory action pending additional proceedings before the Board.

The rules and regulations as promulgated by the National Labor Relations Board unmistakably point out that the filing of a complaint is necessary if additional remedy is sought after a Section 10(l) request for injunctive relief. "Whenever the regional attorney or other Board

officer to whom the matter may be referred seeks injunctiv relief of a district court pursuant to section 10(1) of the act, a complaint against the party or parties sought to be enjoined, . . . shall be issued promptly, normally within 5 days of the date upon which such injunctive relief is first sought. . . ." 29 C.F.R. 10296. The wording of this regulation demonstrates that the Board insists that a complaint be issued. Since the regulation does not demand an immediate filing of a complaint, but allows a period of time, "normally within 5 days", it would not be logical to hold that if an agreement were worked out within that time, the General Counsel must still file the complaint. To so conclude would hinder any attempt at a negotiated settlement prior to filing the complaint.

In the situation here, while the Regional Director as agent of the General Counsel did not obtain a full one hundred percent paper result, he did achieve his basic objectives. The illegal picketing was stopped immediately. The agreement between the Union and the Regional Director provided that if picketing is resumed, the charge against the Union could be reopened. The issue of the illegal picketing was satisfactorily disposed of by the Regional Director's insistence upon arbitration which was helped along by his wisdom in allowing the Union's attempts at face saving in again mentioning its rejected contention that its secondary picketing was not illegal.

For the reasons stated the petition for review is denied. Our decision makes it unnecessary to pass upon the prior motion to dismiss in this matter.

## TERMINAL FREIGHT CO-OP. ASSN. v. NLRB

U. S. Court of Appeals,
Third Circuit (Philadelphia)

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY v. NATIONAL LABOR RELATIONS BOARD, No. 18948, June 7, 1972

On petition for rehearing en banc of 78 LRRM 2097, 447 F.2d 1099. Petition denied.

Before SEITZ, Chief Judge, and McLAUGHLIN, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN, and HUNTER, Circuit Judges, and HANNUM, District Judge.

### Full Text of Order

The petition for rehearing filed by Petitioners in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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### *Dissenting Opinion*

ROSENN, Circuit judge, dissenting:—I respectfully dissent from the denial of this petition for clarification, or in the alternative, rehearing.

The issue in this case is a matter of drawing a line between the right of the General Counsel of the National Labor Relations Board to *unreviewable* discretion to in-

stitute an unfair labor practice complaint, Vaca v. Sipes, 386 U.S. 171, 182, 64 LRRM 2369 (1967), and the right of the charging party to protect what he conceives to be his interests in an adjudication and disposition of that complaint. United Auto Workers v. Scofield, 382 U.S. 205, 60 LRRM 2479 (1965). We concluded in Leeds & Northrup v. NLRB, 357 F.2d 527, 61 LRRM 2283 (3d Cir. 1966), that once the General Counsel had filed a complaint, he had crossed the line from the prosecutorial stage to the adjudicative stage, at which point the charging party "is accorded formal recognition." Id., at 533. He, therefore, had a right to a hearing challenging a subsequent settlement.

The question in this case is, in effect, whether there can be a crossing of that line in the absence of a filing of a formal complaint with the National Labor Relations Board. At least under the facts of this case, this court has answered no. I disagree.

This is not a situation where General Counsel has, after investigation, determined that there is no basis for the issuance of a complaint. Concededly, his exercise of judgment at this point is unreviewable. This case, however, is one where he found cause and initiated corrective action. The charging party (Terminal) complained that during a strike by the International Association of Machinists, District Lodge No. 1 it was subjected to unlawful secondary boycott activity. They filed an unfair labor practice charge against the union with the Regional Director of the NLRB. After investigation of the charge and upon determination that there was reasonable cause to believe it true, the Regional Director, on behalf of the Board, sought first, injuctive relief under Section 10(l) of the National Labor Relations Act, on Terminal's behalf, and second, the issuance of a complaint by the Board. The district court granted a temporary restraining order enjoining the union's alleged secondary activity and a further hearing was fixed on the application for a con-

tinuation of the injunction. However, the hearing was never held and the complaint of the Board never issued because, prior to the date scheduled for the hearing, the union and the Regional Director, over the objections of Terminal, entered into a stipulation providing for the union's cessation of the alleged violation of the Act. Shortly after the district court approved the stipulation and dismissed the case, the union executed an informal settlement agreement with the Regional Director concerning the unfair labor practice charge. Terminal objected to the proposed settlement agreement and requested a hearing on the objections. The objections were dismissed and the hearing denied.

Since our decision in Leeds & Northrup v. NLRB, supra, the Supreme Court has reinforced its conclusion in Scofield by holding that, as a general proposition, those whose interests are sought to be protected by a statute should be able to seek judicial review. Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970); Barlow v. Collins, 397 U.S. 159 (1970). In the somewhat analogous field of internal union governance, it has recently held that a complaining union member may intervene in an action brought by the Secretary of Labor to overturn a union officer election under Section 402 of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 482. Trbovich v. United Mine Workers, 79 LRRM 2193, 40 LW 4161 (1972). See also, Hodgson v. Carpenters Local 2122, 79 LRRM 3046, No. 10,507 (3d Cir. 1972).

In light of this trend of decisions, I would conclude that the charging party, Terminal Freight, is entitled to the hearing it sought on its objections to the settlemen before the Labor Board.

The facts of this case show that the controversy had reached the adjudicative stage. The Regional Director must have found sufficient cause to issue a complaint be-

cause he could not have sought an injunction under Section 10(l), 29 U.S.C. §160(l) without having made such a finding.[1]

I do not see the wisdom in denying a charging party who has filed such a proper and meritorious charge his hearing merely because the Regional Director has decided after obtaining the temporary restraining order not to pursue his application for a complaint before the Board. Once he has found merit to the charge, the Regional Director should not be able to preclude the right of the charging party to be heard by entering into an informal settlement. Cf. Sears Roebuck & Co. v. Solien, 450 F.2d 353, 78 LRRM 2700 (8th Cir. 1971).

I believe that once the Regional Director finds merit to the charging party's complaint, especially when he has, as here, sought injunctive relief in the district court,[2] an amicable adjustment of the labor dispute may not be brought about through informal negotiations without the consent of the charging party.

I would, therefore, grant the petition of Terminal for rehearing.

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[1] I believe that this conclusion is supported by NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 682, 28 LRRM 2103 (1951). Justice Burton, in explaining the function of § 10(l), states: "It [the Board] proceeded under § 10(l) which is designed to assist a preliminary investigation of the charges before the filing of a complaint. If the officer or regional attorney to whom the matter is referred has reasonable cause to believe that a charge is true and that a complaint should issue, the statute says that he shall petition an appropriate District Court for injunctive relief, pending the final adjudication of the Board."

[2] Even at the injunction proceeding, the charging party can appear by counsel and present relevant testimony even though it cannot initiate such action or intervene. Solien v. Miscellaneous Drivers and Helpers Union, Local No. 610, 440 F.2d 124, 76 LRRM 2780 (8th Cir. 1971), cert. denied, 403 U.S. 905, 77 LRRM 2403 (1971).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 4-CC-517

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY,
*Charging Parties,*

and

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 1,
*Respondent.*

---

## APPEAL FROM THE GENERAL COUNSEL'S APPROVAL OF A UNILATERAL SETTLEMENT AGREEMENT OVER THE CHARGING PARTIES' OBJECTIONS

Terminal Freight Cooperative Association and Terminal Freight Handling Company, the Charging Parties in the captioned case, herewith appeal the decision of the General Counsel approving the execution of a unilateral Settlement Agreement in this matter by the Regional Director of the Fourth Regional Office over the objections of the Charging Parties.

### A. RELEVANT CHRONOLOGY

1) The Charges herein were filed on April 18, 1969, alleging that the captioned Union had violated Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act by exerting proscribed pressures upon the Charging Parties and their employees pursuant to a labor dispute with Sears, Roebuck and Co., in which the Charging Parties were neutrals and uninvolved.

2) The Region, having found reasonable cause to believe these Charges were true, on April 24, 1969 petitioned for injunctive relief under Section 10(l) of the Act.

3) In recognition of the fact that the Union's picketing was causing immediate and irreparable harm not only to the Charging Parties but also "to the National Defense and to the public interest", the Regional Director's petition also sought a temporary restraining order which was granted by the District Court on April 24, 1969.

4) A hearing on the Regional Director's petition for further injunctive relief under Section 10(l) was scheduled for April 29, 1969. On that date, in lieu of the relief sought in his petition, the Regional Director sought the District Court's approval of a Stipulation, which was agreeable to the Respondent Union, and which purported to afford a measure of relief from the effects and likelihood of repetition of the Union's unlawful conduct. Although the Charging Parties objected to this Stipulation and sought to secure the holding of a hearing on the pending petition, the District Court Judge approved the Stipulation over their objections. He did so on the grounds that since Charging Parties were not "parties" before him in suits under Section 10(l), therefore they lacked standing to be heard on their objections.

5) On May 1, 1969, the Charging Parties filed their Notice of Appeal of the District Court's action in denying them an effective voice in the adjudication of matters involving their vital interests.

6) On May 13, 1969, the Union executed a proposed Settlement Agreement to whose terms and provisions the Charging Parties filed detailed objections on May 23, 1969.

7) Approximately seven months later, on December 12, 1969, the Regional Director dismissed the Charging Parties' objections and entered into the Settlement Agree-

ment which the Union had executed on the previous May 13th.

8) On December 18, 1969, the Court of Appeals for the Third Circuit dismissed the Charging Parties' appeal in the Section 10(l) cause as being moot since the underlying dispute between the Union and Sears had been settled during the appellate litigation; the Court of Appeals' decision did not reach the merits of the Charging Parties' contention that they had improperly been denied a voice in the disposition of their case in the District Court.

9) On January 22, 1970, the Charging Parties filed detailed objections to the Regional Director's execution of the subject Settlement Agreement in its appeal of that action to the General Counsel.

10) On March 25, 1970, the General Counsel, by its Office of Appeals, denied the Charging Parties' appeal.

In effect, therefore, the General Counsel has succeeded in depriving the Charging Parties from exercising any meaningful control over their own vital interests; before the Agency they were unable to prevent the acceptance of a unilateral settlement of which they disapproved, and in Court they were unable to secure a hearing on their objections to the approval of a Stipulation in lieu of injunctive relief of which they similarly disapproved. And as a final act of disenfranchisement, the Regional Director, in his letter of December 12th dismissing the Charging Parties' objections to the settlement, stated his views that they were not entitled to a hearing on their objections pursuant to *Leeds & Northrup* v. *N.L.R.B.*, 357 F.2d 527 (CA 3, 1966), because no Complaint has ever issued in this case. The Regional Director was able to take this position since,—although his petition for an injunction under Section 10(l) of April 24, 1969 recited that "a Complaint of the Board based on said charge should issue",—he simply failed to issue one during the succeeding seven months.

## B. The Charging Parties' Objections To The Terms and Provisions of the Settlement Agreement and Accompanying Notice.

We begin with two assumptions concerning the status of the parties and the function of the Agency. First, these Charging Parties stand in the posture of parties injured by the Union's commission of serious unfair labor practices; that the Regional Director sought extraordinary injunctive relief on their behalf and concluded that "a Complaint of the Board . . . should issue", constitutes ample support for that assumption. Second, it is assumed that the Agency fails in its legitimate Congressionally delegated function if it does not afford *meaningful*, rather than token, remedies for the protection of those who, it has reasonable cause to believe, were injured by serious and damaging unfair labor practices. With these principles in mind, the Charging Parties lodge the following objections to the Region's acceptance and execution of the subject Settlement Agreement and Notice.

### *1. The Presence Of Disclaimer Language.*

The Settlement Agreement contains a disclaimer by the Union of any violations of the Act. The presence of this language is inconsistent with the Region's earlier determination that a Complaint should issue alleging the existence of such violations; moreover, it is inconsistent with the Region's earlier decision to secure a temporary restraining order and further injunctive relief and, with the Union's *unqualified* Stipulation in the District Court, to cease the described unlawful conduct. Furthermore, it is illogical to permit a party, whom the Regional Director believes to have violated the Act, to deny publicly and officially that it has done so where the Regional Director has no cause to have altered his original beliefs. And clearly, whatever deterrent or curative effect that settlement of cases could afford is vitiated by permitting such

a practice. In short, the inclusion of the subject language serves only to benefit the wrongdoer at the expense of those who have been wronged and at the expense of a proper respect for and functioning of the Agency's own processes.

### 2. *The Language Of The Notice And The Manner Of Its Publication.*

The "Notice to Employees" in its present form serves no legitimate purpose. It is single-spaced, it is without paragraph division, and it is absolutely incomprehensible to those for whom it is intended. To the extent the purpose of the Notice is to convey information to those whose rights have been violated or who have violated the rights of others, the current form of the Regional Director's Notice is an unqualified failure. The misfortune of the Regional Director's and the General Counsel's insistence on that language is that there is neither necessity nor reason for such compressed, technical, obfuscating jargon to be used. Attached to this Appeal you will find a proposed form of Notice which does inform and is understandable, and which is acceptable to the Charging Parties.

Ultimately, the combination of the presence of the disclaimer and the form of the current Notice is to encourage violations of law. A respondent has virtually nothing to lose; he need only to post a Notice which no employee or union member will understand and alongside it post disclaimer language which is so clear that it will be understood by everyone.

The General Counsel's and the Region's defense of its Notice constitutes an irrelevance. It may be, as the Regional Director's letter of December 12th asserts, that the language of the Notice has been used in prior cases, does cover violations charged and does comport with the actual language of the statute. But none of these factors

establish that, apart from technical legal sufficiency, the language is remotely desirable. So long as alternatives exist for the expression of the ideas appropriate to such a Notice, what possible justification can there be for the use of the precise terms of a statute which is indecipherable or unclear even to the experienced practitioners of the lawyer's art? Indeed, the Board has, within recent times at least, advertised its concern that its remedies may not be effective and has actively sought to make them so. In an instance where a Notice constitutes virtually the entire remedy afforded, such as this case, it becomes particularly important that the Notice be readily and thoroughly understandable to everyone if it is to serve any useful purpose at all.

A final question in connection with this Notice relates to the manner in which its message (if any) is to be disseminated. A posting of the Notice will not have the effect of reaching all of the employees to whom it is directed. It is highly unlikely that the employees of Terminal Freight Cooperative Association, Terminal Freight Handling Company or Joseph G. Tropiano, Inc. (none of whom are members of the Union) will see any Notice posted in and about the offices of the Union. It is also unlikely that a majority of the members of the Union will see such a Notice, since most of them probably do not visit the Union hall during any given sixty day period. Accordingly, the Notice should be directed by mail to all those employees, as well as to all members of the Respondent Union. Otherwise, an already ineffectual remedy will be transformed into no remedy at all.

### *3. The Scope of The Remedy.*

Evidence exists, of which the Charging Parties apprised the Regional Director, that District Lodge No. 1 did solicit and obtain the co-operation and assistance of Highway Truck Drivers and Helpers Local No. 107, International Brotherhood of Teamsters, Chauffeurs, Ware-

housemen and Helpers of America, whose membership actively participated in the unlawful activities of the Respondent Union. Philadelphia newspapers reported a meeting of Teamsters Local No. 107 personnel at which a vote was taken to support the action of District Lodge No. 1.

Accordingly, the Respondent Union and Teamsters Local No. 107 became common venturers in the commission of the unlawful acts purportedly being settled in the challenged Agreement.

It is and has been our position that the Region should investigate this case further to determine the full extent of participation by Local No. 107 and its membership in the unlawful activities involved here.

In view of these considerations, we believe it appropriate that Respondent Union be required to forward copies of the Notice to all members of Teamsters Local No. 107, as well as to all of its own members. Copies of appropriate covering letters to which the Notices should be attached are also enclosed herewith.

It is entirely reasonable that since members of Teamsters Local No. 107 engaged officially in assisting Respondent in the commission of the unlawful acts sought to be remedied, that the remedy adopted reach them. Only in this way will the Charging Parties obtain any protection against a repetition of such conduct by members of Local 107, who would otherwise not be apprised of the illegality of their support of Respondent's coercion of neutrals. Only in this way will the Respondent be deterred from seeking similar assistance from the Teamsters or other stranger unions in the future. And only in this way will the adverse effects on the employees and union members who read the aforementioned newspaper coverage of the Teamsters' participation be remedied.

The Region's reference, adopted by the General Counsel, to the Charging Parties' failure to lodge charges

against Local No. 107 is without merit. Apart from the fact that the Region's delay of seven months in rendering its decision to approve the Settlement Agreement has resulted in the expiration of the limitations period under Section 10(b),—even if the Charging Parties had considered filing such charges,—it is entirely common and permissible for appropriately fashioned remedies to reach those who were not charged parties before the Agency. An explicit and representative illustration is *Liberty Electronics Corp.*, 143 NLRB 605 (1963), in which the Board modified an earlier decision in order to extend the remedy of the earlier case to a party which had never been charged; the duty to fashion an appropriate remedy under all the circumstances was deemed sufficient to permit this modification. The facts in the instant case require no less. See also *N.L.R.B.* v. *C.C.C. Associates, Inc.*, 306 F. 2d 534 (CA 2, 1962).

*4. The Importance And Desirability of Securing a Decision On The Merits In The Instant Case.*

Absent a clear determination that the activities of the Respondent Union constitute a violation of Section 8(b)(4), and that such activity would likewise be a violation where any of the other forty-four members of the Association are involved, the issues in this case are viable and a Settlement Agreement of the type accepted by the General Counsel is inappropriate and is not likely to have the desired deterrent effect.

There are sound and important reasons for securing a decision on the merits here. The Charging Party-Association has forty-five members, many of whom have numerous subsidiaries. The Handling Company itself operates from multiple locations throughout the United States. Many of the members of the Association are national defense contractors whose obligations in the area of national defense are likely to continue. Other members of

the Association are engaged in retail merchandising. Virtually all of the members have a real need for timely shipment and delivery of material. The affidavits also indicate that one or two days of picketing may cause extensive delay of months.

There are approximately two hundred associations of the type involved here. Under I.C.C. regulations, these associations are formed for the purpose of taking advantage of the lowest authorized tariff rates. The very existence of such associations is in peril if shipments of all members can be delayed or prevented when there is a primary labor dispute involving any one of the member companies. Defense contractors and retail merchants are not likely to want to assume the risk of membership. In the initial 10(l) proceeding, the General Counsel and the Court shared our view of the importance of these shipments to the point that a temporary restraining order was requested and granted. The resolution of the question concerning such associations falls into the category of important policy decisions and even if there is not a recurrence of the picketing which gave rise to this proceeding, the questions should be resolved. Moreover, members of the many associations of this kind should be permitted the opportunity of choice as to whether they wish to continue such membership. We believe it is also necessary to resolve the issue of whether Terminal Freight Handling Company, being a wholly owned subsidiary of Sears, Roebuck and Co., is a legitimate subject for picketing by employees having a primary dispute with Sears even though Terminal Freight Handling Company operates at the direction of the executive committee of the Association and operates on an actual cost basis without profit to Sears. Obviously, if the Handling Company may be picketed in this case, the Association will want to consider engaging the services of another operating company.

C. THE RELIEF REQUESTED OF THE BOARD.

In light of the considerations discussed above, the unilateral settlement herein, executed over the objections of the Charging Parties, should be set aside. At least, and in the alternative, Charging Parties are entitled—and request—a formal hearing as is conferred in *Leeds & Northrup* v. *N.L.R.B.*, *supra*, on their objections to the current or other Settlement Agreement which does not cure the defects referred to in the preceding section of this Appeal.

To the extent the Board agrees with the Charging Parties' substantive contentions, such actions can appropriately be taken by the Board. In our view, this case has been transferred to the Board from the General Counsel for such disposition on the merits as the Board may deem appropriate.

The General Counsel's contrary position, as expressed in the Regional Director's letter of December 12th, is predicated on the view that this case is not before the Board because no Complaint has ever been issued by the Regional Director. Thus, follows the argument, the decision as to whether to accept the opposed Settlement Agreement is within the sole unreviewable discretion of the General Counsel.

The vice of this argument is that it ignores the fact that the Regional Director determined that a Complaint should issue in this case on specific facts and theories as specifically expressed in his petition for an injunction under Section 10(l). In so doing, he exhausted the area in which he, as agent of the General Counsel, possesses unreviewable discretion. Having made that determination, and without having thereafter changed his view of the facts, theories and principles of law which gave rise to that decision, the issuance of the document itself constitutes only a ministerial act. The decision to issue a

Complaint resulted in a transfer of the case to the Board. Accordingly, absent evidence of the Director's change of position on the merits of his original decision of probable cause, the Director's refusal to issue the document entitled "Complaint" represents either an irrelevance or a withdrawal of a Complaint already issued. In either event, the transfer of the case to the Board has already been achieved. Otherwise, a Regional Director could forever foreclose review of his decision to accept unilateral settlement agreements by the simple act of refusing to issue the document itself for months while the charges remain pending and despite his unrevoked conclusion that the charges are meritorious. Accordingly, a Regional decision that a Complaint should issue—including the related decisions as to which aspects of the Act were violated, which theories of law support the finding of a violation of law and what relief is appropriate,—results in a transfer of the case to the Board and renders the holding of a *Leeds & Northrup* hearing appropriate.

Further support for this view derives from the language of Section 10(l) itself. That Section provides that

> "if after such investigation [of the Charging Parties' Charge] the officer or regional attorney . . . has reasonable cause to believe such Charge is true *and that a Complaint should issue*, he shall, *on behalf of the Board*, petition any district court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter." (Emphasis added)

It must be noted that the statute does *not* require that the Complaint itself, as a document, issue before the case is deemed to be before the Board; the *decision* that reasonable cause exists to believe the law was violated is sufficient to involve the Board, so that any action subsequent to that decision is the *Board's* action and those who act do so "on behalf of the Board".

Accordingly, the execution by the Regional Director of a Settlement Agreement subsequent to his decision that a Complaint should issue is an act which he takes "on behalf of the Board".

Given this conclusion, together with the fact that the objections raised herein are substantial and are of enormous importance to these Charging Parties who require adequate relief and who have already been picketed in this case by the Union in violation of an outstanding temporary restraining order, it is urged that the contentions advanced here be adopted: The Board should declare that this case was transferred to the Board pursuant to the decision of the General Counsel to issue a Complaint and Notice of Hearing; the Charging Parties' objections to the adoption and approval of the instant Settlement Agreement are meritorious; and that Agreement should, therefore, either be set aside by the Board with instructions to proceed to hearing if the parties cannot agree to the terms of a settlement, or, at the least, an evidentiary hearing pursuant to the direction of *Leeds & Northrup* should be convened in order to litigate in a proper forum the merits of the Charging Parties' objections to the subject Settlement Agreement.

Respectfully submitted,

JERRY KRONENBERG
JOHN W. PELINO
Attorneys for Terminal Freight
Cooperative Association and
Terminal Freight Handling Co.

BOROVSKY, EHRLICH & KRONENBERG
111 West Washington Street
Chicago, Illinois 60602

PELINO, WASSERSTROM & CHUCAS
22nd Floor, Architects Building
17th and Sansom Streets
Philadelphia, Pennsylvania 19103

April 28, 1970

Re: Terminal Freight Handling Co.
Case No. 4-CC-517

JERRY KRONENBERG, ESQUIRE
BOROVSKY, EHRLICH & KRONENBERG
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

DEAR MR. KRONENBERG:

This is in response to your appeal from the General Counsel's approval of a unilateral settlement agreement in the above-captioned proceeding.

An examination of your appeal on behalf of the Charging Parties shows that it is based on the refusal of the Regional Director and the General Counsel to issue a complaint on the basis of a charge filed on April 18, 1969, alleging violations of Section 8(b)(4)(i)(ii)(B) of the Act and the acceptance of an informal settlement agreement executed by the Respondent Union. On March 25, 1970, the General Counsel advised you by letter that your appeal had been considered and denied for substantially the reasons given in the Regional Director's letter of December 17, 1969 stating the grounds for refusal to issue a complaint.

Pursuant to Section 3(d) of the Act, the General Counsel is charged with the sole responsibility for investigating a charge and determining whether a complaint shall issue and his discretion is not reviewable by the Board. See *Local Union 466, International Brotherhood of Electrical Workers, AFL-CIO, (Moore Electric Company)*, 126 NLRB 912. For these reasons, the Board cannot entertain your appeal from the General Counsel's acceptance of the settlement agreement and refusal to

issue a complaint. I am, therefore, returning all copies of your appeal with the exception of one which has been retained for the Board's informal file.

Very truly yours,

GEORGE A. LEET
Associate Executive Secretary

Encls.
cc: Joseph Barmann
Office of Appeals
GAL:emc

Supreme Court, U. S.
FILED
SEP 27 1972
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

No. 72-501

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING COMPANY,
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

MILTON A. SMITH
*General Counsel*

OTTO F. WENZLER
*Labor Relations Counsel,*
Chamber of Commerce of
the United States of America
1615 H Street, N.W.
Washington, D.C. 20006

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE M. COHEN
Lederer, Fox & Grove
111 West Washington Street
Chicago, Illinois 60602
*Attorneys for the Chamber of Commerce of the United States of America*

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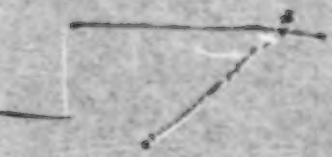

IN THE

# Supreme Court of the United States

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No.

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TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING COMPANY,
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

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## BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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### I.

### INTEREST OF THE AMICUS CURIAE

This brief is filed on behalf of the Chamber of Commerce of the United States of America, a federation with a membership of over 3,800 state and local chambers of commerce and trade associations. The Chamber has an underlying membership of more than five million business firms, the vast majority of which are subject to the National Labor Relations Act.[1]

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[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(1).

The issue presented here—whether, once the General Counsel of the National Labor Relations Board has determined to issue an unfair labor practice complaint, he may thereafter adjudicate the rights of charging parties without providing them with the opportunity to be heard and to obtain review of his actions—is a matter of substantial interest to the Chamber. The Chamber has sought on several recent occasions to obtain a delineation by this Court of the rights of charging parties before the Board[2] and, in particular, their rights in the context of settlement negotiations.[3] This area is one which lacks any authoritative guidance. It is one which employers, as well as unions and individual charging parties, encounter daily and which, perhaps more than any other, is dispositive of their disputes before the agency. Moreover, this Court and the lower courts, as Circuit Judge Rosenn noted in his dissenting opinion in the court below, have been increasingly careful to insure that "those whose interests are sought to be protected by a statute should be able to seek judicial review." The instant case represents a sharp departure from that trend. By rea-

[2] The Chamber was thus instrumental in obtaining review by this Court in two cases raising the issue of the rights of charging parties in proceedings under Section 10(l) of the Act, only to have the question become moot before it was decided. *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655 (1970); *The Los Angeles Herald Examiner* v. *Kennedy*, 400 U.S. 3 (1970). The Chamber also supported unsuccessful efforts to present similar matters to this Court last term. *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, No. 1588, and *Terminal Freight Cooperative Association* v. *Solien*, No. 71-925.

[3] In two cases last term, in which the Chamber filed *amicus* briefs, review was unsuccessfully sought to resolve a controversy as to (a) whether a Board regional director may decline to petition for injunctive relief under Section 10(l) of the Act in favor of securing lesser or other relief through a settlement agreement (*Terminal Freight Handling Co.* v. *Solien*, No. 71-609) and (b) whether a Board regional director may exclude charging parties from meaningful participation in the settlement of their charges (*Sears, Roebuck and Co.* v. *Solien*, No. 71-924).

son of the decision below, the parties whose very aggrievement is at the crux of the controversy are deprived of any judicial recourse.

For each of these reasons, the Chamber has a significant concern in this case and respectfully requests the Court to consider its views.

## II.

## REASONS FOR GRANTING THE WRIT

1. Pre-complaint settlement negotiations—and the rights of charging parties in such negotiations—are matters that go to the heart of the Act. In recent years about 90 per cent of all Board cases have been disposed of without formal adjudication. Approximately 80 per cent of all matters which the General Counsel believes to be meritorious are settled prior to a decision by the Board. *Thirty-Fifth Annual Report of the National Labor Relations Board* for 1970, pp. 1, 4; *Thirty-Fourth Annual Report of the National Labor Relations Board* for 1969, p. 1. Many of these cases are settled in the precise situation involved in this case, *i.e.*, where a determination as to issuance of a complaint has been made even though no actual complaint has issued.

2. The decision of the court below places charging parties at a substantial disadvantage in such a case. The charging party is deprived of the right to be heard on objections to the proposed disposition of his charges as well as the right to appeal from an adverse disposition thereof. These are rights accorded charging parties at other stages of the adjudicatory process. Indeed, it is only by means of such rights that the charging party may project his views as to the remedial adequacy of the proposed relief and in some degree affect his own destiny within the proceedings he himself initiated and in which he has a paramount concern. There is no basis,

once the General Counsel has made a decision, as in the instant case, that there is reasonable cause to believe a charge is true and that complaint should issue, to deprive a charging party of such a necessary protection of his vital interests.[4] The propriety of such a deprivation, potentially affecting all charging parties before the Board, is one which deserves the attention of this Court.[5]

3. Apart from affecting the right of a charging party to participate in and obtain review of the disposition of his charges, the decision below also had additional significant ramifications. The charging party has a full panoply of rights once a case enters the adjudicatory, in contrast to the investigative, stage. It is at this point that the General Counsel's unreviewable discretion terminates.[6] Once a case reaches the point of adjudication,

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[4] The decision below is diametrically contrary to the Eighth Circuit's approach in *Sears, Roebuck and Co.* v. *Solien*, 450 F.2d 353 (8th Cir. 1971), *cert. den.* No. 71-924, O.T. 1971. There, in a case involving an attack upon the manner in which the General Counsel negotiates a settlement, the court held the suit premature. It noted that there was still the possibility of "administrative relief from the Board" and thereafter by an appellate court which could review "*all* questions of the regularity of Board proceedings, Constitutional rights, or statutory authority . . ." (Emphasis added). In the instant case, by concluding that this matter falls within the General Counsel's "unreviewable discretion", the lower court has precluded precisely such further recourse to the Board and courts.

[5] The instant case presents one of the rare opportunities for this Court to review the important questions presented. As settlements are of the most use to parties with limited means and as the legal avenues for obtaining review of settlement procedures are ill-defined, it is unlikely that parties will be inclined to bring the problems to the Court's attention. This ground alone is sufficient to warrant consideration of such important issues. See, *e.g.*, *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47 (1938). *Cf. Silver King Co.* v. *Conkling Mining Co.*, 256 U.S. 18 (1921).

[6] The present case also affords the Court with an opportunity to refine the area of the General Counsel's discretion and clarify the equity actions permitted under *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938), to contest actions of the General Counsel which are not subject to Board review by virtue of § 3(b) of the

all parties have the right to be timely informed as to the controverted issues and the time, place and nature of the proposed hearing for their resolution. 5 U.S.C. § 1004(a). They also have the right to have the agency proceed to such a hearing "with reasonable dispatch". 5 U.S.C. § 1005(a); *Deering-Milliken* v. *Johnson*, 295 F.2d 856 (4th Cir. 1961). There are, in addition, other adjudicatory rights expressly conferred by the Administrative Procedure Act[4] (5 U.S.C. § 1004), the Rules and Regulations of the National Labor Relations Board[5] and the decisions of various courts.[6] And there is the right, once the General Counsel has made his final determination as to whether complaint will or will not issue, that

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Act. For example, in *Sears, Roebuck and Co.* v. *Solien*, 450 F.2d 353 (8th Cir. 1971), *cert. den.* No. 71-924, O.T. 1971, the Court implied that *in no case*, apart from the limited situation contemplated by *Leedom* v. *Kyne*, 358 U.S. 184 (1954), would a district court be entitled to review the action of the General Counsel. Other courts, however, have questioned such a restricted view of the General Counsel's discretion. *Southern California District Council of Laborers* v. *Ordman*, 318 F.Supp. 633 (C.D.Cal. 1970); *Local 12, Allied Industrial Workers* v. *Pothman*, 209 F.Supp. 295 (D.D.C. 1962); *Frito Company* v. *NLRB*, 330 F.2d 485 (9th Cir. 1964); *Amalgamated Association of Street, Electrical, Railway and Motor Coach Employees of America* v. *Lockridge*, 403 U.S. 274, 2 L.E.D. 473, 493, n.2 (1971) (Dissenting Opinion of Mr. Justice Douglas). *Cf., Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155 (7th Cir. 1970).

[5] *Cf., e.g.*, Section 101.7 of the Board's Rules and Regulations, establishing the procedure utilized in disposing of charges prior to the institution of "formal action by issuance of a complaint", and Section 101.9, setting forth the far-different procedure to be followed once such "formal proceedings have begun". The critical difference, it is submitted, should not be that which the Board draws such "informal" and "formal" stages of the adjudicatory process. Rather, the line must be drawn, as mandated by Section 8(d) of the Act, between the investigative and adjudicative stages in a Board proceeding.

[6] See, *e.g.*, *Automobile Workers* v. *NLRB*, 427 F.2d 330 (6th Cir. 1970), holding that the Board may not decline whether conduct complained of is an unfair labor practice and, if it so finds, issue a remedial order. See also *Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965).

such a decision be made available to the public. 5 U.S.C. § 552; *Sears, Roebuck and Co.* v. *Goslee*, —— F.Supp. ——, 80 LRRM 3428 (D.D.C., August 10, 1972).[9]

4. The question of when a case crosses the line from the investigative to the adjudicatory stage is thus of fundamental importance in the administration of the Act. In effect, the issue is when the work of one agency, the General Counsel, has concluded and the work of another agency, the Board, has begun.[10] The decision below, by obscuring the point of demarcation, has created substantial doubts as to the rights which flow from the statutory scheme. These doubts should be laid to rest. A consideration of the issue here presented, accordingly, will not cause the Court's time to be misspent.

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[9] This right to be informed of the General Counsel's determination which often becomes critical in subsequent grievance-arbitration proceedings (as, for example, when the applicable contract makes Board law determinative) and in otherwise regulating conflicting interests of the parties, may disappear all together under the decision below. Thus, should a meritorious charge be settled, as in the present case, there is no record of the General Counsel's discretion that he should proceed to complaint. Conversely, should a decision be made that a charge is not meritorious, a withdrawal is thereafter solicited and if obtained similarly leaves the parties with no record as to the General Counsel's determination. Rules and Regulations of the Board, § 101.5. The position urged in this case by petitioners and the Chamber, and applied by the Court in *Sears*, would preclude this incongruous result.

[10] In *Sears, Roebuck and Co.* v. *Goslee*, —— F.Supp. ——, 80 LRRM 3428, 3429, n.9 (D.D.C. August 10, 1972), the Court noted that "General Counsel concedes that in the performance of his pre-complaint prosecutorial authority, he is clearly an agency within the meaning of 5 U.S.C. § 551(1)."

## III.

## CONCLUSION

For the foregoing reasons, the Chamber urges this Court to grant the petition for writ of certiorari.

Respectfully submitted,

MILTON A. SMITH
*General Counsel*

OTTO F. WENZLER
*Labor Relations Counsel,*
Chamber of Commerce of
the United States of America
1615 H Street, N.W.
Washington, D.C. 20006

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE M. COHEN
Lederer, Fox & Grove
111 West Washington Street
Chicago, Illinois 60602

*Attorneys for the Chamber of Commerce of the United States of America*

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-501

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY, PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. We respectfully invite the Court's attention to the following facts, which show that the petition was filed out of time. The judgment of the court of appeals was entered on May 9, 1972 (Pet. 2), and a petition for rehearing *en banc* was denied on June 7, 1972 (Pet. App. 26). The 90-day period for filing a petition for a writ of certiorari prescribed by 28 U.S.C. 2101(c) expired on September 5, 1972, and no extension of time was obtained. The petition was

filed on September 26, 1972. Regardless of the reasons given for the failure to file the petition within the period provided by 28 U.S.C. 2101(c), the time limitation there prescribed is jurisdictional.[1]

2. In any event, there is no reason to grant the writ.[2] The court of appeals held that the General Counsel's "unreviewable discretion to refuse to institute an unfair labor practice complaint" (*Vaca* v. *Sipes*, 386 U.S. 171, 182)[3] includes the power to

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[1] Petitioners initially moved for an extension of time on September 5, 1972, the last day for filing the petition. Petitioners' counsel states that sometime "later that day" he was erroneously advised by "an unidentified female employee" in the Clerk's Office that the untimely motion had been granted, and that it was not until September 7, 1972, that he learned that the information was incorrect (Motion To File Petition, pp. 3-4). Petitioners' principal counsel, who is located in Chicago, Illinois, states that a "typewritten proof" of the brief would have been filed on September 5, 1972, had he been told that the request had been denied. On September 7, 1972, petitioners resubmitted its motion for an extension of time, relating the facts described above. On September 12, 1972, Mr. Justice Brennan denied the motion. The petition was not filed until September 26, 1972.

[2] This Court has denied review of petitioners' earlier efforts to obtain review of action taken by the General Counsel of the Board in connection with the settlement of unfair labor practice charges filed by them. *Sears, Roebuck & Co.* v. *Solien*, No. 1588, 1970 Term, certiorari denied, 403 U.S. 905; *Terminal Freight Handling Co.* v. *Solien*, No. 71-609, 1971 Term, certiorari denied, 405 U.S. 996; *Sears, Roebuck & Co.* v. *Solien*, No. 71-924, 1971 Term, certiorari denied, 405 U.S. 996; *Terminal Freight Cooperative Ass'n* v. *Solien*, No. 71-925, 1971 Term, certiorari denied, 405 U.S. 996.

[3] Section 3(d) of the National Labor Relations Act (Pet. 3) gives the General Counsel of the Board "final authority, on

enter into a *pre-complaint* informal settlement with the charged party, and that therefore it lacked jurisdiction to compel the General Counsel to accord the charging party an evidentiary hearing on its objection to the settlement. For the reasons set forth in the opinion of the court of appeals (Pet. App. 22-25), that holding is correct.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

PETER G. NASH,
*General Counsel,*
*National Labor Relations Board.*

NOVEMBER 1972.

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behalf of the Board, in respect of the investigation of charges and the issuance of complaints * * *, and in respect of the prosecution of such complaints before the Board * * *."

[4] There is no conflict among the courts of appeals. *Frito Company, Western Division* v. *National Labor Relations Board*, 330 F. 2d 458 (C.A. 9) (Pet. 9, 10-11, 15), is inapposite. That case holds only that, where the General Counsel has permitted the charging party to introduce evidence which goes beyond the issues framed by the complaint, the Board does not impinge upon the General Counsel's prosecutory authority in permitting, over the objection of the General Counsel, "an amendment of the complaint to conform to proof admitted without objection" (330 F. 2d at 465).

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-[illegible] 1

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY,
*Petitioners,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## REPLY BRIEF ON BEHALF OF PETITIONERS.

JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 South LaSalle Street
Chicago, Illinois 60603
JOHN W. PELINO
MORRIS L. CHUCAS
PELINO, WASSERSTROM & CHUCAS
Architects Building
17th and Sansom Streets
Philadelphia, Pennsylvania 19103
BURT A. BRAVERMAN
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N. W.
Washington, D. C. 20006
*Attorneys for Petitioners Terminal Freight Cooperative Association and Terminal Freight Handling Company*

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972.

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**No. .....**

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TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY,
*Petitioners,*

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*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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## REPLY BRIEF ON BEHALF OF PETITIONERS.

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The Board's Opposition Memorandum herein requires brief response in several respects:

### A. ON THE MERITS.

**1. The Board's Failure to Address the Question Presented.**

The Board's discussion, however brief, of the issue presented here argues from a factual and conceptual perspective that is not involved in this proceeding. This case does not present an instance where the General Counsel has determined that no violation of law has occurred; the General Counsel did not conclude that relief was uneces-

sary; the charging parties—petitioners do not seek review of the General Counsel's refusal to conclude that the National Labor Relations Act was violated. Rather, and unlike *Vaca* v. *Sipes*, 368 U. S. 171 (1967), which the Board cites as if its facts paralleled this case, here the General Counsel did conclude that the Act was violated and that the Board's processes should be involved in an effort to secure appropriate relief.

The Board fails to address itself, as did the court below, to the thrust of petitioners' contention in this case, i.e., that the General Counsel's act of making a decision on the merits of pending charges effects an exhaustion of the discretion conferred upon him in Section 3(d) of the Act, not the issuance of the document entitled "Complaint". Nor did either the court, or the Board in its Memorandum, distinguish the situation in which the failure to issue that "Complaint" was based on the General Counsel's belief that no violation of law was committed, which is an unreviewable decision, and the quite different situation presented here, in which that refusal traced only to the General Counsel's choice among alternative forms of remedy in meritorious cases.[1]

The combination of these oversights has led the Board to an erroneous conclusion. By assuming that it is the issuance of the Complaint itself which transfers a case to the Board, rather than the decision that unlawful acts occurred of which the Complaint is one of various alternative results, the Board's Memorandum concludes that pre-Complaint settlements are immune from review. That it is the decision and not the document that confers jurisdiction on the Board

1. The court below mistakenly understood the petitioners to argue that the filing of an injunction petition by the General Counsel which recited that "a Complaint should issue" was equivalent to the issuance of a Complaint. Rather, it was petitioners' contention that such a recital merely evidenced the fact that the General Counsel had made his decision on the merits and thereby exhausted his discretion under Section 3(d).

follows not only from the logic of the arguments to which the Board fails to respond but is an express holding of the Ninth Circuit in an opinion issued subsequent to the filing of the petition for certiorari herein. In *Waterway Terminals Co.* v. *N. L. R. B.*, ..... F. 2d ....., 81 LRRM 2449 (CA 9, October 10, 1972), the court held that judicial review is available from the dismissal of a hearing under Section 10(k) of the Act despite the argument that such review is barred because the General Counsel had not issued a Complaint. In proceedings under Section 8(b)(4)(D) of the Act, issuance of a Complaint is withheld pending the related Section 10(k) proceedings. The latter are instituted upon finding of reasonable cause to believe the law was violated, hence are analogous to petitions for injunction under Section 10(l), as is involved in the instant proceeding.

## 2. The Decision in Waterway Terminals Co. Presents a Conflict in the Circuits.

Both in *Waterway* and here, ancillary proceedings to the Board's final adjudication on the merits were undertaken on the basis of the same finding of probable cause; in both instances no Complaint was issued; in both instances the Board urged that review of administrative conduct was barred by the failure to issue that document. Whereas the court below adopted the Board's argument, the court in *Waterway* did not. Yet both equally involved action by the Board in disposing of the merits of a pending charge. Both, therefore, involved an appealable "final order of the Board". Whatever differences may exist between Sections 10(k) and 10(l), Section 3(d) applies equally to both; if all pre-Complaint decisions are unreviewable in the one instance as a consequence of the operation of 3(d), then presumably the same result should apply in the other. That

courts have taken differing views on the matter warrants this Court's clarification.[2]

This Court has recently been confronted with a case which raises the question which the Board erroneously treats as being involved here. In *Saez* v. *Goslee*, No. 72-440, this Court denied a petition for writ of certiorari in which the petitioner sought, in effect, to secure review of General Counsel's refusal to issue Complaint *where the General Counsel found no merit to the charge filed.* Here, the General Counsel found merit in the charges filed by the aggrieved parties but determined not to issue a Complaint for reasons unrelated to the question of the existence either of injury or a violation of statutory right. The distinction between the *Saez* case and the instant case lies at the heart of the instant petition but has received no recognition either by the Board or the court below.

The petitioners herein seek no disruption of Board processes[3] nor, as in *Saez*, do petitioners seek a hearing for every unfair labor practice filed, nor even any review of decisions by the General Counsel that charges lodged with him lack merit. Rather, petitioners seek only to secure review of the General Counsel's disposition, absent the aggrieved charging parties' consent and over their objections, and without hearing, however restricted, of those cases in which the General Counsel has determined that remedial injury has occurred to their statutory rights. No basis has been suggested by the Board or the court below to establish Congress' intent that review in such cases is to be foreclosed by Section 3(d) of the Act and the "unreviewable discretion" it is alleged to afford.

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2. Wholly apart from the *Waterway* decision, a conflict in the Circuits already existed by virtue of the Eighth Circuit's decision in *Sears, Roebuck and Co. et al.* v. *Solien*, 450 F. 2d 353 (CA 8, 1971) (see pages 15 and 16 of petition for writ of certiorari).

3. Nor does the Board contend that the result sought by petitioners would have that effect.

## B. ON THE TIMELINESS OF THE PETITION.

These petitioners, comprising over forty national companies which have in the past been aggrieved by the conduct of the General Counsel which is challenged here, have diligently and in good faith sought clarification of both the question posed here and related questions of charging parties' rights before the Board. The Board's Memorandum in Opposition, at footnote No. 2, constitutes ample proof of that fact. The problems attendant to the filing of the instant petition, not wholly chargeable to petitioners, should not, as a matter of sound procedure and equitable practice, prohibit review of important questions so earnestly pursued. The delay in filing the printed petitions, to which the Board's Opposition makes reference, being in part a function of when notice was received by principal counsel of the Court's action on the motion for extension of time and in part a result of the decision-making process which followed, should not be taken to reflect doubt on the serious averment of experienced counsel.

Respectfully submitted,

JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 South LaSalle Street
Chicago, Illinois 60603

JOHN W. PELINO
MORRIS L. CHUCAS
PELINO, WASSERSTROM & CHUCAS
Architects Building
17th and Sansom Streets
Philadelphia, Pennsylvania 19103

BURT A. BRAVERMAN
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N. W.
Washington, D. C. 20006

*Attorneys for Petitioners Terminal Freight Cooperative Association and Terminal Freight Handling Company*